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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 232

ROBERT B. BLALACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 112–123) is reported at 154 F. 2d 591.

JURISDICTION

The judgment of the circuit court of appeals was entered April 5, 1946 (R. 111), and a petition for rehearing was denied May 13, 1946 (R. 139). The time for filing a petition for a writ of certiorari was extended to and including June 27, 1946, by order of Mr. Justice Reed, entered June 3, 1946. The petition was filed June 25, 1946. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether the Taft amendment to the Emergency Price Control Act of 1942 precluding the "Administrator" from requiring grade labeling of any commodity applied to a regulation promulgated by the Economic Stabilization Director under the Stabilization Act of 1942.

2. Whether the evidence is sufficient to support the verdict.

3. Whether the trial judge committed reversible error in refusing certain instructions requested by petitioner.

STATUTES AND REGULATIONS INVOLVED

The Taft amendment to the Emergency Price Control Act of 1942 (Act of July 16, 1943, c. 241, § 5 (a), 57 Stat. 566, amending the Emergency Price Control Act of January 30, 1942, c. 26, Title I, § 2, 56 Stat. 24) added to Section 2 of the Emergency Price Control Act a new subsection (50 U. S. C. App., Supp. IV, 902 (j)) providing, in pertinent part, that:

> Nothing in this Act shall be construed * * * (2) as authorizing the Administrator to require the grade labeling of any commodity.

Regulation No. 1[1] of the Office of Economic Stabilization provides, in pertinent part:

> Section 4002.1. No person shall * * * store or retain in his possession * * * any beef, veal, lamb or mutton unless such beef, veal, lamb or mutton has been graded and grade marked in the manner required by this regulation * * *.

Section 4002.2 thereof provides:

> No person shall * * * break * * * any * * * veal carcass or wholesale cut unless each such carcass and wholesale cut has been identified by grade in accordance with the provisions of this section. * * *
>
> Section 4002.2 (a) (2). Veal carcasses and the wholesale cuts therein contained shall be graded into the following uniform grades: Choice, good, commercial, utility and cull. In determining the grade of each such carcass the "Specifications for Official United States Standards for Grades of Veal and Calf Carcasses" set forth in § 1364.529 of Revised Maximum Price Regulation No. 169, and incorporated here-

[1] The Regulation (8 F. R. 10988), effective August 5, 1943, recites that it was promulgated "pursuant to the provisions of the Act of October 2, 1942, entitled 'An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes' (Public Law No. 729, 77th Congress, 2nd Session), Executive Order No. 9250, dated October 3, 1942, and Executive Order No. 9328, dated April 8, 1943."

The Regulation has been amended five times, but none of these amendments are relevant here.

in by reference, shall be used and the grade of such carcass shall apply to each wholesale cut derived therefrom, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice.

STATEMENT

Two informations were returned against petitioner in the United States District Court for the Western District of Tennessee on July 5, 1945, and July 23, 1945, respectively, charging that he violated provisions of the Stabilization Act of 1942 and of Regulation No. 1 of the Office of Economic Stabilization promulgated thereunder. The first information charged, in three counts, that petitioner had unlawfully (1) purchased and received ungraded meat, (2) broken a veal carcass, and (3) sold and offered to sell ungraded and unmarked meat (R. 2–4). The second information charged, in one count, that petitioner had unlawfully stored and retained in his possession meat not graded or grade marked as required by the applicable statute and regulation (R. 7).

Petitioner demurred to both informations on the ground, *inter alia,* that they did not state offenses against the laws of the United States (R. 10–12). The demurrer was overruled (R. 13), and thereafter the informations were consolidated for trial (R. 12, 13). After a trial by jury (R. 13), petitioner was found not guilty on counts 1

and 3 of the first information, and guilty on count 2 thereof and on the second information (R. 14). He was sentenced to imprisonment for eight months and to pay a fine of $500 on count 2 of the first information (R. 15–16), and to imprisonment for eight months and to pay a fine of $1,000 on the second information (R. 16), the terms of imprisonment to run concurrently (R. 16). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 111).

The evidence in support of the government's case [2] may be summarized as follows:

Beginning in 1941, petitioner operated under oral month to month lease two proximate, though not contiguous, retail meat markets in Memphis, at Nos. 200 and 210 North Cleveland Street (R. 38, 41). These properties were part of a large public market 2½ to 3 blocks square, known variously as the "City Markets" and the "Curb Markets" (R. 37). Petitioner's two shops contained "coolers" or "lockers," which were originally the only space available to him for storage and refrigeration (R. 38). In the spring of 1944, he leased additional cooler space (R. 38), described as "sizable" (R. 67), in another curb market building in back of and about 250 feet from the nearest of his two shops, and installed

[2] Petitioner offered no evidence but moved for a directed verdict at the close of the government's case (R. 80–84).

in it a 16 by 20 foot refrigerator (R. 38, 39, 42, 63).[3]

On June 9, 1945, a Department of Agriculture Meat Inspector, Dr. George E. Mitchell, accompanied by the Food Director of the Memphis Health Department, Samuel P. Penny, called at petitioner's place of business to investigate an alleged illicit interstate shipment of ungraded calves (R. 50–51, 64). Their visit was not directed to the violations here involved, nor did they in any way represent the Office of Economic Stabilization or the Office of Price Administration (R. 62, 63–64). They first inspected the lockers in the two retail markets and found that all the carcasses stored there were properly graded and stamped (R. 50–51, 65). Then, after some questioning, petitioner admitted to Mitchell and Penny that he maintained the other cooler in the back building (R. 52). He told them he used it only for hog carcasses and that nothing was in it at that time (R. 52, 66). The two officials then walked over to the separate cooler, but found it locked (R. 53, 66). Penny immediately returned to the retail shop and asked petitioner for the key (R. 66). Petitioner replied, "just a minute," walked off and was not seen again that day (R. 66). Petition-

[3] Petitioner had had a partner named Ledbetter, but on January 29, 1945, he acquired Ledbetter's entire interest by contract of sale and thereafter was sole proprietor and operator of the business conducted at all three locations (R. 38, 39, 41, 44).

er's former partner testified that at least until the dissolution of the partnership on January 29, 1945, the key to the cooler was hung from a post in one of the retail shops and was not accessible to outsiders except with permission (R. 46–47). The officials finally got the key from one Thomas, petitioner's employee (R. 53). They entered the cooler and found hanging there three large veal carcasses, weighing 225 pounds each, and, on a nearby table, a quantity of freshly cut up steaks and roasts, some of them in white porcelain pans and others in paper wrappings, besides a box full of bones and five hides (R. 53–55, 67). None of this meat bore any inspection or grade marking of any kind whatever, and the three carcasses were broken or "split" and then subdivided into quarters (R. 53, 54, 59, 68). On one paper wrapping the name "May" was written; on another paper, the notation "Cosby 1.25"; and on still another, "Mr. Mertz 4 TB Stks, 3 QrB Rst Rump" (R. 55, 79). The officials then sealed the cooler, returned to the retail market, and looked for petitioner but could not find him (R. 56, 57, 68). They left word with Thomas that they would return on Monday, June 11, at 9:00 a. m. and that petitioner should be on hand at that time (R. 58, 68).

When they returned the following Monday accompanied by the Supervising Investigator for the Food Enforcement Unit of the OPA, petitioner

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could not be located (R. 58, 59, 76, 77). After waiting for him for about two hours, the officials again went to the cooler, found the seal intact, entered it, and enabled the OPA Investigator to note the contents for himself (R. 58, 69, 76–77). Petitioner was not seen again prior to the trial except by Dr. Mitchell on Thursday or Friday of the following week (R. 58). When asked where he had been on Monday, June 11, he replied that he "* * * was looking for the man, for the fellow that put the meat in the cooler, looking all over the country," although he admitted at the same time that he had no idea who had put it there (R. 59). To the further query—"How did you know who to look for, if you didn't know who put it in," he replied merely that "he didn't know who put it in" (R. 59).

ARGUMENT

1. Petitioner urges that the Taft amendment to the Emergency Price Control Act of 1942 was a limitation on the Economic Stabilization Director as well as the Price Administrator and, therefore, made the issuance of O. E. S. Regulation No. 1 without legal basis (Pet. 22–26). However, this argument is negated by both the language and history of the amendment and the regulation.

The pertinent language of the Taft amendment is that "Nothing *in this Act* [i. e., the Emergency

Price Control Act] shall be construed * * * as authorizing *the Administrator* to require the grade labeling of any commodity. * * *"[4] The "Administrator" whose power is thus circumscribed can only refer to the Administrator of the Office of Price Administration and to no one else, since the Emergency Price Control Act also provides that (Section 201 (a), 50 U. S. C. App., Supp. V, 921 (a)):

> There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator").

There is nothing elsewhere in the Emergency Price Control Act or the Taft amendment to give any other meaning to the term "Administrator." Nor does Section 7 (b) of the Stabilization Act of 1942, under which Act the Regulation was promulgated, require any other conclusion. That section made certain provisions of the Emergency Price Control Act applicable to regulations "issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of"[5] the Stabilization Act. However, the Regulation was not "issued by the Price Administrator," but by the Economic Stabiliza-

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[4] Emphasis supplied.

[5] Sec. 7 (b), Act of October 2, 1942, c. 578, 56 Stat. 767, 50 U. S. C. App., Supp. V, 967 (b).

tion Director.[6] In fact, the directive of the Economic Stabilization Director authorizing the Price Administrator to enforce the Regulation confirms this; it expressly stated that the power to enforce was not to include the power to change, amend, revoke, or rescind its provisions or to issue regulations requiring grade labeling of any commodity.[7]

That the Taft amendment was a limitation on the power of the Price Administrator alone and does not affect the validity of Regulation No. 1 is corroborated by Senator Taft's remarks on the floor of the Senate[8] and the fact that Congress,

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[6] For the same reason, i. e., that the Economic Stabilizer promulgated the Regulation under authority of the Stabilization Act of 1942, there is no foundation for petitioner's suggestion (Pet. 25–26) that Section 2 (h) of the Emergency Price Control Act (50 U. S. C. App., Supp. V, 902 (h)) is violated by O. E. S. Regulation No. 1. The latter section of the Emergency Price Control Act in terms applies only to the exercise of powers under that Act by the Price Administrator.

[7] Directive No. 184, of September 14, 1943 (8 F. R. 12669).

[8] At 89 Cong. Rec. 7252:

"Mr. GEORGE. Mr. President, I was about to ask how the language in the joint resolution would affect whatever power there would be, but I see the suggestion is offered by way of amendment to the Emergency Price Control Act itself.

"Mr. TAFT. Yes. All the powers of the Price Administrator are derived from that act, so it affects only his powers."

The "resolution" referred to was H. J. Res. 147, to continue the Commodity Credit Corporation. It was as a "rider" to this measure that Senator Taft offered his amendment to the Emergency Price Control Act prohibiting grade labeling by the Price Administrator. Its adoption by the Senate followed immediately after the quoted colloquy (89 Cong. Rec. 7250–7252).

being aware of the administrative construction,[9] twice reenacted both the Emergency Price Control Act and the Stabilization Act [10] without changing the provisions of the Taft amendment. Under familiar principles, the administrative interpretation that the Economic Stabilization Director was empowered [11] to promulgate the Regulation and was not limited by the Taft amendment, must be deemed to have been ratified. See, e. g., *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Koshland* v. *Helvering*, 298 U. S. 441, 445; *Taft* v. *Commissioner of Internal Revenue*, 304 U. S. 351, 357.

2. Petitioner's second point is that the conviction must be reversed because it was based wholly on circumstantial evidence which did not exclude

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[9] Congress must be deemed to have known of the administrative construction by reason of the publication of the Regulation in the Federal Register (8 F. R. 10988). Moreover, on October 27, 1943, a subcommittee on Brand Names of the House Committee on Interstate and Foreign Commerce had reported that O. E. S. Regulation No. 1 "* * * was designed to allay widespread fears that following the Taft amendment grading and labeling of meat would have to be discontinued * * *" and that "No opposition against this system of grading and labeling of meat was voiced at any time in testimony before the subcommittee." H. Rep. No. 808, 78th Cong., 1st sess., p. 36.

[10] 58 Stat. 632; 59 Stat. 306.

[11] The authority for this exercise of power derived from Sections 1 and 2 of the Stabilization Act of 1942 was fully set forth in the Stabilization Director's Statement of Reasons accompanying the Regulation. See I O. P. A. *Food Desk Book*, pp. 1031–1032.

every reasonable hypothesis but that of guilt, and because, even if on appeal a conviction based on circumstantial evidence is to be tested by the substantial evidence rule, the evidence does not support the conviction (Pet. 27–43).

We are constrained to disagree with petitioner on both phases of this argument. As shown in the Statement and as recited by the court below (R. 116–117):

> It was established that appellant was the owner of the meat business and controlled two retail meat shops and leased the cooler where the unlabeled meat was found. The cooler was about 75 feet from one market and 250 feet from the other. There is a substantial inference that appellant deliberately absented himself on Monday morning, necessitating a wait at the cooler by the agents for a matter of two hours and finally, entry by way of a window. There were at least three skinned carcasses in the cooler which had been in the process of being cut into roasts, etc. One piece of meat was even wrapped up and had a name and address on it. There was ample evidence of substantial activity with unlabeled meats on the part of some one. Appellant's employees had access to the cooler and there was no evidence that any one else ever had unsupervised access thereto. There is a strong inference that appellant's employees, then, were working the meat. It is most

> unlikely that any one of those employees could have used the cooler and have done that volume of butchering without the fact coming to appellant's ears. It is more likely that they were working at appellant's direction. These facts and inferences, coupled with appellant's suspicious conduct at the time Dr. Mitchell and Mr. Penny asked him about the cooler, his absence immediately thereafter, and his inconveniencing absence on Monday morning, when he was asked to be present, supply, we think, competent and substantial evidence to support a conclusion that he had knowledge of what was happening.

Petitioner's attack upon the circumstantial strength of the facts thus recited (Pet. 28–32) is without warrant. Contrary to petitioner's suggestion that his possession of the meat was merely constructive and therefore not enough to establish an inference of guilt, the facts show that his possession was more actual than constructive. The cooler in which the meat was located was in a building nearby the retail premises actively operated by petitioner, and the key to the meat cooler was kept on the latter premises and used only by or with the permission of petitioner or his employees. This possession was far different from the technical constructive possession flowing from ownership alone which was involved in the *Russo* case, 123 F. 2d 420 (C. C. A. 3), and others

cited by petitioner (Pet. 28–29). Petitioner further attempts to show that his absence from his place of business while agents were inspecting the premises cannot raise an inference of guilt, because it was normal and explainable. But the evidence is to the contrary, particularly the testimony that he was evasive in disclosing that he had the cooler in question, that he disappeared when on June 9 Dr. Mitchell and Mr. Penny asked him for the keys to the cooler, and that he did not respond to their request, left with his employee Thomas, to be there at nine o'clock the following Monday morning. Moreover, no weight can be given petitioner's argument that the evidence of quantities of ungraded meat in the cooler cannot lay the basis for an inference that he, or his employees acting for him, was responsible because others had access to the cooler and could have put the meat there. Even assuming the remote possibility that someone else brought the meat through the cooler window by day or night or somehow surreptitiously gained use of the key from petitioner's retail store and thereby obtained access to the cooler and used it to store and cut the quantities of meat later found there, it is highly improbable that all of this could have been accomplished without the fact coming to petitioner's attention. By the same token, it is highly improbable that his employees were the guilty parties, unknown to him, where he main-

tained active control and operation of the adjoining retail premises.

It is apparent, therefore, that all of the circumstances pointed positively and not conjecturally[12] to petitioner's guilt, so that the trial judge properly denied his motion for a directed verdict. But petitioner urges that the court below applied an erroneous test in determining the propriety of the trial judge's ruling; that it applied the substantial evidence rule rather than the rule, applicable to cases predicated on circumstantial evidence, that the evidence must exclude every reasonable hypothesis except that of guilt. Several circuits in reviewing rulings on a motion for directed verdict have stated the requirement as petitioner contends. See, e. g., *Leslie* v. *United States,* 43 F. 2d 288, 289–290 (C. C. A. 10). But these opinions are not in accord with decisions of this Court or with the historically proper treatment of the function and scope of a motion for directed verdict. Thus, in *Glasser* v. *United States,* 315 U. S. 60, this Court said (at p. 80):

> It is not for us to weigh the evidence or to determine the credibility of witnesses.

[12] Petitioner partially relies upon an alleged rule that an inference cannot be built upon an inference in attempting to demonstrate that the ultimate evidentiary conclusions were insupportable (Pet. 29, 31). But, as Wigmore correctly demonstrates, "There is no such orthodox rule; nor can be. If there were, hardly a single trial could be adequately prosecuted." Wigmore, *Evidence* (3d ed.), § 41, p. 435.

> The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States* v. *Manton*, 107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances." *United States* v. *Manton, supra.* We are clear that, from the circumstances outlined above, the jury could infer the existence of a conspiracy and the participation of Roth in it.

Even assuming, *arguendo,* that the evidence must be viewed as if by the jury, it is sufficient to support the verdict. That test is, as stated by petitioner, that where guilt depends on circumstantial evidence, the evidence *in toto* must be inconsistent with any reasonable hypothesis of innocence. But the rule does not require the exclusion of *every* hypothesis or possibility of innocence, but only of any *fair* and *reasonable* hypothesis except that of guilt.[13] Nothing in the rule prevents the jury's finding guilt entirely upon circumstantial evidence; and the requirement of

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[13] "Circumstantial evidence need not be such that no possible theory other than guilt can stand, but the theory of guilt must be beyond a reasonable doubt, i. e., the circumstances must not be consistent with innocence within a reasonable doubt." 2 Wharton's *Criminal Evidence* (11th ed.) § 922, p. 1608.

proof beyond a reasonable doubt operates on the whole case and not upon separate bits of evidence. Tested by these principles, the evidence here amply justified the verdict as shown above. The circumstances were such that it was, at best, only a remote possibility that someone else unknown to petitioner could have been the party who put the meat in the cooler. That, coupled with petitioner's obvious evasion of the Government's agents, excluded every reasonable hypothesis but that of guilt.

3. Petitioner's third and last point is that it was prejudicial error for the trial judge to refuse certain requested instructions. The first was that the jury was precluded from speculating as to which of two or more individuals might have committed the offense; the second was that finding unstamped meat on property previously rented to petitioner was insufficient to overcome the presumption of innocence (Pet. 44–46). The impropriety of such instructions has, in effect, already been answered by our argument in point 2 above. The trial judge correctly refused the first instruction because, from the evidence, the jury would not be speculating as to whether petitioner or someone else was responsible for the ungraded meat being in the cooler, the evidence excluding every reasonable hypothesis but that petitioner himself was responsible. It would

have been error, therefore, for the court to have instructed the jury, as requested, and thereby create an assumption, entirely unwarranted from the evidence, that it was speculative whether petitioner or someone else was the responsible party. Cf. *United States* v. *Turley,* 135 F. 2d 867 (C. C. A. 2), certiorari denied *sub nom. Burns* v. *United States,* 320 U. S. 745; *Grace* v. *United States,* 4 F. 2d 658 (C. C. A. 5), certiorari denied, 268 U. S. 702. For similar reasons, the second instruction was properly refused. It was predicated on one isolated bit of evidence, the fact that petitioner had previously rented the cooler, and misleadingly treated this bit of evidence as if it were the only evidence for the jury's consideration to weigh against the presumption of innocence. Cf. *Showalter* v. *United States,* 260 Fed. 719 (C. C. A. 4), certiorari denied, 250 U. S. 672; *Mannix* v. *United States,* 140 F. 2d 250 (C. C. A. 4); *United States* v. *Dewinsky,* 41 F. Supp. 149 (D. N. J.). However, as has been shown above, there was an abundance of evidence, of which this was only one small part, which the jury properly could and must have taken into consideration in determining petitioner's guilt.

CONCLUSION

The decision below is correct, and there is involved no question of importance or material

conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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